

DOCKET SECTION
DOCKET SECTION

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268

RECEIVED
OCT 14 4 39 PM '97
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

EMERY'S RESPONSE TO UPS MOTION TO COMPEL
PRODUCTION OF INFORMATION AND
MATERIALS REQUESTED IN INTERROGATORIES
TO POSTAL SERVICE WITNESS SHARKEY
October 14, 1997

Emery Worldwide, One Lagoon Drive, Suite 400, Redwood City, CA 94065, opposes the motion to compel production of information and materials requested in UPS's eighth set of interrogatories to witness Sharkey (UPS/USPS-T33-43 through 58). As demonstrated in the affidavit attached as Exhibit A, revealing the information and materials requested in the interrogatories would be tantamount to revealing Emery's costs and pricing strategies and would give UPS an unfair advantage in competition with Emery. To the extent that this information is relevant and necessary to the pending rate proceeding, Emery consents to its production only pursuant to a protective order that precludes access by UPS competitive decision-makers.

ARGUMENT

I. The Postal Rate Commission is not the proper forum to decide the confidentiality of the Priority Mail contract.

UPS's argument that Emery has provided insufficient grounds to insist on a protective order is really a request that Postal Rate Commission conduct an analysis of the propriety of withholding confidential portions of the Priority Mail contract under the Freedom of Information

Act ("the FOIA") and the Trade Secrets Act. See 5 U.S.C § 552(b)(4); 18 U.S.C. § 1905. But this is not the proper forum to conduct such an analysis. If UPS believes that the Postal Service is improperly withholding certain information contained in the Priority Mail Contract, it may appeal that decision under the procedures set out in the FOIA. See 5 U.S.C. § 552(a)(5)(B) (de novo review of decision to withhold documents). Moreover, the protective conditions proposed by Emery would allow UPS's attorneys and experts to have access to the information they seek in this proceeding. Just as if the information were generally released, they could use it to evaluate costs to the Postal Service of transporting Priority Mail. The only real limitation on the attorneys and experts is that they cannot use it for other purposes, such as in making competitive decisions that might affect Emery. Preventing UPS competitive decision-makers from reviewing Emery's confidential information would thus not prejudice UPS.

II. Emery has established that portions of the Priority Mail Contract are proprietary and confidential.

Despite Emery's agreement to disclose the Priority Mail Contract under protective order, the affidavit attached as Exhibit A demonstrates sufficient grounds to withhold it. The FOIA and the Trade Secrets Act prohibit disclosure of trade secrets and privileged or confidential commercial or financial information. 5 U.S.C § 552(b)(4); 18 U.S.C. § 1905. Information is confidential if its release would cause substantial harm to the competitive position of the person releasing it. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Contractor costs, profit margins, and pricing strategies have been uniformly found to be exempt from disclosure under FOIA because releasing that information "would allow competitors to estimate, and undercut [the contractor's] bids." See Gulf & Western Indus. v.

United States, 615 F.2d 527, 530 (D.D.C. 1979). And if releasing unit prices would effectively reveal a contractor's costs or pricing strategies, unit prices cannot be released. Sperry Univac Div. v. Baldridge, No. 82-0045-A, 1982 U.S. Dist. LEXIS 17764 (E.D. Va. June 16, 1982) (attached as Exhibit B).

A. Releasing the Priority Mail Contract would reveal Emery's costs and pricing strategies.

As Emery emphasized in its memorandum supporting the Postal Service's objections to the UPS interrogatories — as well as the affidavit attached as Exhibit A — release of the Priority Mail Contract would be tantamount to revealing Emery's costs and pricing strategies. The Priority Mail Contract contains 106 pages of detailed pricing schedules. The schedules contain separate line items for transporting flats, parcels, and outsides between each of ten Priority Mail processing centers ("PMPCs") and a multitude of Air Mail Centers ("AMCs") and Area Distribution Centers ("ADCs"). It also contains adjustment factors for variations in the volume of pieces transported. The price variations reflected in the pricing schedule reflects Emery's experience in the industry and its analysis of costs and profits on the various routes. Even the table of contents contains confidential information about Emery's pricing strategies and techniques.

This detailed pricing information would allow UPS, or any other competitor, to infer and predict Emery's costs for transporting different size pieces between the destinations chosen by Emery. Releasing the Priority Mail Contract would also reveal Emery's pricing strategies. It would allow competitors to see the prices that Emery has concluded are appropriate for transporting individual pieces between PMPCs, AMCs, and ADCs. It would allow them to avoid

the extensive work involved in developing such a pricing strategy. At the very least, it would allow Emery's competitors to estimate and undercut Emery's bids on other commercial and government air freight contracts — a result prohibited by the FOIA and the Trade Secrets Act. Gulf & Western, 615 F.2d at 530. Beyond undercutting, Emery's bids, UPS or other competitors could use the information to determine which Emery routes are more profitable than others and which routes are discounted and to evaluate their own ability to compete on Emery routes. They could develop a plan to undercut Emery's prices on Emery's most profitable routes, leaving Emery with the less profitable ones — effectively "cherry-picking" Emery's best routes. Such unfair competition would cause substantial harm to Emery's competitive position in the air transportation market.

B. Emery and the Postal Service treat the Priority Mail Contract as confidential.

The fact that Emery and the Postal Service have consistently treated the Priority Mail Contract as confidential also demonstrates that it should not be released without an appropriate protective order. See Sperry Univac Div. v. Baldridge, 1982 U.S. Dist. LEXIS 17764, *8 (E.D. Va. 1982) (attached as Exhibit B). The Priority Mail Contract has been treated as confidential throughout its preparation, negotiation, and performance. The Priority Mail Contract itself prohibits Emery from providing copies to any third parties without express approval of the Postal Service. Clause G.8 of the contract allows Emery's subcontractors or prospective subcontractors to see the contract only under the terms of a nondisclosure agreement:

G.8 Nondisclosure Agreements

- a. The offeror may distribute this RFP, or any resultant contract, or the USPS internally prepared design to subcontractors

or prospective subcontractors who have executed Nondisclosure Agreements with the Postal Service. *No other distribution of the solicitation, or any resultant contract, is permitted.*

(Priority Mail Contract (Clause G.8) (emphasis added).) Once a subcontractor or prospective subcontractor is permitted access, the nondisclosure agreement limits the availability of information to those employees who (1) are actively involved in projects for the Priority Mail Contract and (2) have a legitimate reason to know the information. (See Ex. D (nondisclosure agreement executed by Wickwire Gavin, P.C.)

Emery strictly complies with this requirement and instructs its employees that the information is confidential and not to be disclosed. Emery also strictly limits access by subcontractors and prospective subcontractors to those who have executed a nondisclosure agreement. Even Emery's counsel was required to execute and comply with a nondisclosure agreement before reviewing or discussing any aspect of the Priority Mail Contract with Emery. (See Ex. D.)

C. Release of the WNET, TNET, and ANET contracts does not require release of the Priority Mail Contract.

The Postal Service's release of the portions of the WNET, TNET, and ANET contracts attached to UPS's motion is not relevant to the release of the Priority Mail Contract. None of those contracts contained the extensive pricing schedules contained in the Priority Mail Contracts. The WNET and TNET contracts were not Emery contracts and they do not contain the extensive pricing information contained in the Priority Mail Contract. They contain only about ten line items each for aircraft, crews, maintenance, supplies, and other items. (See UPS Ex. A & B.) The portions of the ANET contract attached to UPS's motion reveals no pricing

information at all.¹ (See UPS Ex. C.) None of the three contracts correlates per-piece unit prices to volumes and origin-destination information as in the Priority Mail Contract. Release of the daily rate for aircraft on the WNET contract would not permit an analysis of Evergreen's pricing strategy and discount rates. But analysis of the pricing schedules in the Priority Mail Contract would allow UPS or other competitors to do exactly that with Emery's prices. Not only would release of the Priority Mail Contract give UPS access to the prices for each of Emery's origin-destination pairs, but it would allow them to see Emery's adjustment factors for volume. By allowing UPS to take advantage of Emery's corporate experience and analysis of transportation costs and economies, it would give UPS an unfair competitive advantage. The Priority Mail Contract should thus be released only under an appropriate protective order.

III. Only a protective order that bars access by UPS competitive decision-makers will adequately protect Emery's proprietary and confidential information.

UPS's characterization of the proposed protective conditions as "draconian" is unfounded. Essentially identical protective orders are used at GAO and in other federal courts.² Their provisions were specifically intended to minimize the risk of inadvertent disclosure where a company seeks confidential information developed by a competitor. The protective order and the applications for access to protected materials proposed by Emery were adopted almost *verbatim* from the guide on bid protest practice published by the General Accounting Office itself. (See Exhibit C (United States General Accounting Office, Bid Protests at the GAO: A Descriptive Guide, Appendix I: Sample Protective Order (5th ed. 1995)).) The GAO order

¹ The document identified by UPS as the ANET contract appears to be portions of the contract awarded to Evergreen Airlines, the Air Terminal Handling Contractor, not Emery. The contract thus contains no Emery proprietary information.

properly requires counsel to disclose those lawyers in their firm who cannot represent they are not involved in making their client's competitive decisions. They require consultants to identify their firm's clients, and they even require disclosure of information about spouses. Emery requests that the Postal Rate Commission follow this example. The requirement that consultants provide resumes and disclose the nature of the work and the identity of their clients is intended to provide the Rate Commission with information needed to assess the risk of inadvertent disclosure. A person whose spouse or law partner is involved in developing marketing or pricing strategies for UPS should not be allowed access to Emery's proprietary information. Such a restriction appropriately minimizes the risk that Emery's confidential information will be used by its competitors. As at GAO, the restrictions proposed by Emery are justified.

CONCLUSION

Emery proposes to release the entire Priority Mail Contract, including its table of contents and the detailed pricing schedules, under protective order. The protective order proposed by Emery — the one adapted from GAO's Bid Protest Guide — sufficiently eliminates the risk that the confidential and proprietary information contained in the Priority Mail Contract would be released to anyone involved in competitive decision-making for UPS or Emery's other competitors. Emery requests that the Rate Commission deny UPS's motion to compel, enter the proposed protective order, and consider applications for access to protected material.

DATED this 14th day of October 1997.

Respectfully submitted,

EMERY WORLDWIDE

By Counsel

WICKWIRE GAVIN, P.C.
8100 Boone Boulevard, Suite 700
Vienna, Virginia 22182
(703) 790-8750

By: Brian Waegner for
David P. Hendel

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice. The document was mailed by first-class, postage-prepaid mail this 14th day of October 1997.

Brian Waegner
David P. Hendel

1982 U.S. Dist. LEXIS 17764 printed in FULL format.

SPERRY UNIVAC DIVISION OF SPERRY CORPORATION, Plaintiff, v.
MALCOLM BALDRIDGE, SECRETARY United States Department of
Commerce, Defendant.

CIVIL ACTION NO. 82-0045-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
VIRGINIA Alexandria Division

1982 U.S. Dist. LEXIS 17764

June 16, 1982

OPINIONBY: [*1]

COLLIER

OPINION: MEMORANDUM OPINION AND ORDER

RECEIVED
OCT 14 4 40 PM '97
POSTAL RATE CO.
OFFICE OF THE SECRETARY

The issues in this reverse Freedom of Information Act case arise by virtue of the parties' Cross Motions for Summary Judgment.

Plaintiff, Sperry Univac (Sperry) seeks a declaratory judgment and an injunction barring the Secretary of Commerce (Agency) from disclosing current-year price and discount information in connection with a contract awarded by the Agency to Sperry in 1980 for the supply of an Automatic Data Processing System (ADP).

I

The contract (No. BC-81-SAC-66287) was awarded upon the bid submitted by Sperry in response to the Commerce Department's Request for Proposals. Under the terms of the contract, Sperry was to provide hardware, software, maintenance, training and related service in connection with the lease and purchase by the Agency of a new data processing system known as the Census Control System. The contract had a value in excess of nine million dollars.

In July and August of 1981, two of Sperry's competitors, Burroughs Corporation and Centennial Corporation, requested disclosure of the contract pursuant to 5 U.S.C. @ 522, the Freedom of Information Act (FOIA). Subsequently, in September 1981, [*2] the Department of Commerce advised Sperry of these requests. By letteres dated October 1st and November 5th, 1981, Sperry objected to the requests for disclosure.

On November 18, 1981, the Agency denied in part the FOIA requests, stating that the unit price and discount data contained in the contract was confidential commercial and financial information, "the disclosure of which would likely cause Sperry substantial competitive disadvantage." On December 2nd and December 14th, 1981, Burroughs and Centennial noted their appeals from the Agency's decision.

Sperry again noted its objections on December 29, 1981, and filed an affidavit supporting its contention that the requested information was confidential and a trade secret, the release of which would cause substantial competitive injury to Sperry.

EXHIBIT

B

ALL-STATE INTERNATIONAL

On appeal, the Agency partially reversed its earlier decision withholding the contract price information. By letter dated January 18, 1982, the Department of Commerce advised Sperry of its decision to release fiscal year 1982 price information including monthly unit amounts, monthly extended amounts and line item maintenance charges. Future-year price information would [*3] not be disclosed.

As a result of the Agency's determination, Sperry filed this action on January 22, 1982, seeking to enjoin the Agency's decision and seeking a judicial declaration that such disclosure would be impermissible.

Upon Motion of the Agency and upon Order of this Court, the case was remanded to the Agency for reconsideration and reevaluation of its prior decision. Release of the relevant information was enjoined pending further Order of this Court.

On remand, the Secretary of Commerce, through his general counsel, elected to uphold his earlier determination to disclose current-year unit prices and to withhold future-year price information, stating:

I have concluded that my determination of January 18, 1982, is correct and should not be modified. Thus, it is my determination that:

1. The unit prices contained in the contract which the Department is obligated to pay this fiscal year and not exempt from disclosure under the Freedom of Information Act and should be made available to the public.
2. The Monthly Unit Amounts, Monthly Extended Amounts and the fiscal year line item maintenance charges for fiscal years 1983 through 1989 are exempt from disclosure [*4] under exemption (b)(4) of the FOIA (5 U.S.C. @ 552(b)(4)).

Sperry proffers four grounds for setting aside the Secretary's decision. First, the Agency's disclosure would be inconsistent with the FOIA exemption Three, 5 U.S.C. @ 552(b)(4) and the Trade Secrets Act. Third, the Agency action was arbitrary and capricious and not in accordance with the law. Finally, Sperry contends that disclosure would constitute an unlawful taking of its property without due process of the law.

II

The FOIA is a disclosure statute. Section 5 U.S.C. 552(a) creates an obligation on the part of agencies to make certain information in their possession available to the public upon request. Subsection (b) of the FOIA sets forth nine specific exemptions to an agency's duty to disclose. This exemption subsection does not foreclose disclosure, rather, it merely establishes those classes of information which the agency may withhold.

In particular, Title 5 U.S.C. @@ 552(b)(3) & (4) state:

This section does not apply to matters that are --

* * *

(3) specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that matters be

withheld [*5] from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

The Trade Secrets Act, 18 U.S.C. @ 1905, has been found to be a qualifying statutory exemption within the meaning of @ 552(b)(3) of the FOIA. *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190, 1199-1203 (4th Cir. 1976). In addition, the Fourth Circuit has also held that the scope of the Trade Secrets Act and Exemption 4 of the FOIA "are . . . "the same," or, . . . "coextensive." Accordingly, material qualifying for exemption under (b)(4) falls within the material, disclosure of which is prohibited under @ 1905." *General Motors Corp. v. Marshall*, 654 F.2d 294, 297 (4th Cir. 1981), citing *Westinghouse*, 542 F.2d at 1204 n. 38.

Title 18 U.S.C. @ 1905 provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any [*6] information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association . . .

shall be subject to criminal penalties. (emphasis supplied).

The Supreme Court has stated that "[s]ince materials that are exempt from disclosure under the FOIA are . . . outside the ambit of that Act, the Government cannot rely on the FOIA as congressional authorization for disclosure regulations that permit the release of information within the Act's nine exemptions." *Chrysler Corp. v. Brown*, 441 U.S. 281, 303, 304 (1979). It follows, though perhaps it begs the question, that disclosure under the Trade Secrets Act may not be considered "authorized by law" by virtue of the FOIA if that information falls under one of the nine FOIA exemptions; therefore, [*7] the FOIA may never be considered authorization for disclosure for Trade Secrets Act purposes.

Under the FOIA, specifically 5 U.S.C. @ 552(a)(4)(5), only persons seeking to enjoin an alleged wrongful withholding of agency information may seek District Court review. That section does not provide for review in reverse FOIA cases such as this. In addition, 18 U.S.C. @ 1905, a criminal statute does not provide a private right of action to enjoin disclosure. *Chrysler Corp. v. Brown*, 441 U.S. 281, 316-317 (1979); *General Motors Corp. v. Marshall*, 654 F.2d 294, 297 (1981).

However, the Trade Secrets Act does provide the plaintiff a procedural right to judicial review by this Court under the Administrative Procedure Act, 5 U.S.C. @ 706, as a person "adversely affected or aggrieved" by agency action. That statute provides, in part, that this Court shall:

(2) hold unlawful and set aside agency action, findings and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

* * *

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The Supreme [*8] Court in Chrysler, 441 U.S. at 318, in considering a similar reverse FOIA case involving disclosure of employment records and statistics concluded that de novo review would not ordinarily be necessary; rather, "any disclosure that violates @ 1905 is "not in accordance with law" within the meaning of 5 U.S.C. @ 706(2)(A)." De novo review in such a situation is not proper.

III

The sole issue remaining in this case is whether or not release of the Sperry's current-year price information would violate the Trade Secrets Act.

In this regard the Court notes that the information in question was submitted by Sperry under an express claim of confidentiality. That is, the price and discount information submitted in connection with the Request for Proposal contained the restriction that it not be disclosed outside the Government. In addition, Sperry maintained a policy of strict confidentiality and non-disclosure of this type of information in its dealings and with its employees.

The contract itself provides for an initial term during which the Agency would lease the ADP equipment. At the end of the first year and in each subsequent year for eight years, the contract is subject [*9] to renewal. Competitors may underbid Sperry and capture the Government contract for any subsequent year. Moreover, the contract provides for termination at the convenience of the parties permitting the Agency to cancel the contract at the end of a one year term if another computer vending company betters Sperry's price.

The price information in question was of a specific nature. If released, competitors would be given insight into Sperry's pricing strategy. Since some item and unit prices were discounted, competitors would be able to infer and predict the extent to which Sperry could discount specific contract items. Such information not only could reveal Sperry's discount strategy, but would jeopardize Sperry's contract with the Agency in future years, thus placing Sperry at a competitive disadvantage.

IV

This Court concludes that the current-year price information in question constitutes a trade secret and confidential statistical data and is of such a character that disclosure of this information would violate the Trade Secrets Act, 18 U.S.C. @ 1905, and therefore, it is ORDERED:

(1) that plaintiff's Motion for Summary Judgment is granted and that the defendant is [*10] enjoined from disclosing plaintiff's price and discount information obtained in connection with Contract No. BC-81-SAC-66287;

(2) that defendant's Motion for Summary Judgment be, and the same hereby is, denied;

(3) that the Clerk shall forward certified copies of this Memorandum Opinion and Order to all counsel of record.

GAO

United States General Accounting Office
Office of General Counsel

Fifth Edition
1995

Bid Protests at GAO: A Descriptive Guide

RECEIVED
OCT 14 4 40 PM '97
POSTAL RATE CO. 10000
OFFICE OF THE SECRETARY

GAO/OGC-95-27

EXHIBIT

C
ALL-STATE® INTERNATIONAL

Introduction

The laws and regulations that govern contracting with the federal government are designed to ensure that federal procurements are conducted fairly and, whenever possible, in a way that maximizes competition. On occasion, however, bidders or others interested in government procurements may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that they have been unfairly denied a contract or an opportunity to compete for a contract. A major avenue of relief for those concerned about the propriety of an award has been the General Accounting Office, which for almost 75 years has provided an objective, independent, and impartial forum for the resolution of disputes concerning the award of federal contracts.

Over the years, GAO has developed a substantial body of law and standard procedures for considering bid protests. This is the fifth edition of Bid Protests at GAO: A Descriptive Guide, prepared by the Office of the General Counsel to aid those interested in GAO's bid protest process. We issued the first edition of this booklet in 1975 to facilitate greater public familiarity with the bid protest process at GAO and we have revised it over the years to reflect changes in our bid protest procedures. This edition incorporates changes made to our Bid Protest Regulations, effective October 1, 1995, to implement the Federal Acquisition Streamlining Act of 1994 and to streamline the bid protest process at GAO.

Sample Protective Order

The sample protective order and the sample applications for access to materials under a protective order are provided for informational purposes only and are subject to change.

GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

File No.:
Protesters:
Solicitation No.:
Agency:

NOTIFICATION OF PROTECTIVE ORDER

Attached is a copy of the protective order issued in connection with the above referenced protest. Counsel seeking admission shall complete and submit the attached application to our Office with a copy provided simultaneously to all parties; applications for consultants are available upon request. A party objecting to any individual's application shall so advise our Office by the second working day following receipt of the application. While applications may be filed by facsimile transmission, a hard copy with original signature must also be submitted.

Please note that the protective order and application reflect substantial revisions implemented in October 1994.

—For the Senior Associate General Counsel

FOR FURTHER INFORMATION:

GAO attorney: (202/512-97__)
Case status calls: 202/512-5436
Facsimile transmissions: 202/512-9749

Appendix I
Sample Protective Order

UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548

Matter of:

File:

Agency:

PROTECTIVE ORDER

This protective order limits disclosure of certain materials and information submitted in the above-captioned protest, so that no party obtaining access to protected materials under this order will gain a competitive advantage as a result of the disclosure. Materials to which parties gain access under this order are to be used only for the subject protest, absent express prior authorization from the General Accounting Office (GAO). Such authorization must be requested in writing, with notice to all parties.

1. This protective order applies to all materials that are identified by any party as protected, unless GAO specifically provides otherwise.
2. Protected materials of any kind may be provided only to GAO and to individuals authorized by this order, and must be in a sealed parcel containing the legend "PROTECTED MATERIAL ENCLOSED," conspicuously placed on the outside of the parcel containing the protected information. The first page of each document containing protected material is to be clearly marked as follows:

**PROTECTED MATERIAL
TO BE DISCLOSED ONLY IN ACCORDANCE WITH
GENERAL ACCOUNTING OFFICE PROTECTIVE ORDER**

The party claiming protection must clearly identify the specific portion of the material for which it is claiming protection. Whenever such protection is claimed for a protest pleading, the party filing the pleading shall submit a proposed redacted version for public release when the protected version is filed.

3. Only individuals who are admitted under the protective order by GAO, and support staff (paralegal, clerical and administrative personnel) who are employed or supervised by individuals admitted under this protective order, and who are not involved in competitive decisionmaking for a party to the protest or for any firm that might gain a competitive advantage from access to the protected material disclosed under this order, shall have access to information covered by this protective order. Individuals admitted under the protective order shall advise such support staff, prior to

Appendix I
Sample Protective Order

providing them access to protected material, of their obligations under the protective order.

4. Each party included under this protective order shall receive a single copy of the protected material and shall not duplicate that material, except as incidental to its incorporation into a submission to GAO or as otherwise agreed to by the parties with GAO's concurrence.

5. When any party sends or receives documents in connection with this protest that are not designated as protected, including proposed redacted versions of protected documents, the party shall refrain from releasing the documents to anyone not admitted under this order, including clients, until the end of the second working day following receipt of the documents by all parties. This practice permits parties to identify documents that should have been marked protected before the documents are disclosed to individuals not admitted under the protective order.

6. Each individual covered under this protective order shall take all necessary precautions to prevent disclosure of protected materials, including but not limited to physically securing, safeguarding, and restricting access to the protected materials. The confidentiality of protected material shall be maintained in perpetuity.

7. Within 20 working days after the disposition of this protest (or if a request for reconsideration is filed, 20 working days after disposition of that request), all protected materials furnished to individuals admitted under this order, including all copies of such materials, shall be: (1) returned to the party which produced them; or (2) with the prior written agreement of the party which produced the protected material, destroyed and certified as destroyed to the party which produced them; or (3) with the prior written agreement of the party which produced the protected material, retained under the terms of this protective order for such period as may be agreed. Within the same 20-day period, protected pleadings (including copies in archival files and computer backup files) and written transcripts of protest conferences and hearings shall be destroyed, and the destruction certified to GAO and the other parties, unless the parties agree otherwise, video transcripts produced by GAO shall be returned to our Office. In the absence of such agreement and for good cause shown, the period for retention of the protected material under this paragraph may be extended by order of GAO. Any individual retaining material received under this protective order beyond the 20-day period without the authorization of GAO or the prior written agreement of the party which produced the material is in violation of the protective order.

8. Any violation of the terms of this protective order may result in the imposition of sanctions as GAO deems

Appendix I
Sample Protective Order

appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting the practice of counsel before GAO. A party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

Senior Attorney or
Assistant General Counsel

Date

Sample Applications for Access to Materials Under a Protective Order

UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20348

Matter of:

File:

Agency:

APPLICATION FOR ACCESS TO MATERIALS
UNDER PROTECTIVE ORDER
FOR OUTSIDE COUNSEL

1. I, _____, hereby apply for access to protected materials covered by the protective order issued in connection with this protest.

2. I am an attorney with the law firm of _____ and have been retained to represent _____ a party to this protest.

3. I am a member of the bar(s) of _____; my bar membership number(s) is/are _____.

4. My professional relationship with the party I represent in this protest and its personnel is strictly one of legal counsel. I am not involved in competitive decisionmaking as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this protest, or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.

5. I identify here (by writing "none" or listing names and relevant circumstances) those attorneys in my firm who, to the best of my knowledge, cannot make the representations set forth in the preceding paragraph:

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

(Attach additional pages for this and the following questions, if needed.)

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the protest or with any other firm that might gain a competitive advantage from access to the material disclosed under the protective order:

7. I identify here (by writing "none" or identifying the name of the forum, case number, date, and circumstances) instances in which I have been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal:

8. I identify here (by writing "none" or listing the protest name and file number) any pending application for admission to a protective order issued by GAO:

9. I have read the protective order issued by GAO in this protest, and I will comply in all respects with that protective order and will abide by its terms and conditions in handling any protected material filed or produced in connection with the protest.

10. I acknowledge that any violation of the terms of the protective order may result in the imposition of sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including any attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date Executed

Typed Name and Title

Name of Firm

3

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548

Matter of:

File:

Agency:

APPLICATION FOR ACCESS TO MATERIALS
UNDER PROTECTIVE ORDER
FOR IN-HOUSE COUNSEL

1. I, _____, hereby apply for access to protected materials covered by the protective order issued in connection with this protest.

2. I am in-house counsel for _____, a party to this protest.

3. I am a member of the _____ of _____; my bar membership number(s) is/are _____.

4. My professional relationship with the party I represent in this protest and its personnel is strictly one of legal counsel. I am not involved in competitive decisionmaking as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this protest, or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.

5. I have attached a detailed narrative providing the following information:

- (a) my position and responsibilities as in-house counsel, including my role in providing advice in procurement-related matters;
- (b) the person(s) to whom I report, and their position(s) and responsibilities;
- (c) the number of in-house counsel at the office in which I work, and their involvement, if any, in

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

competitive decisionmaking and in providing advice
in procurement-related matters;

- (d) my relationship to the nearest person involved in competitive decisionmaking (both in terms of physical proximity and corporate structure); and
- (e) measures taken to isolate me from competitive decisionmaking and to protect against the inadvertent disclosure of protected material to persons not admitted under the protective order.

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the protest or with any other firm that might gain a competitive advantage from access to the material disclosed under the protective order:

(Attach additional pages for **AMF** and the following questions, if needed.)

7. I identify here (by writing "none" or identifying the name of the forum, case number, date, and circumstances) instances in which I have been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal:

8. I identify here (by writing "none" or listing the protest name and file number) any pending application for admission to a protective order issued by GAO:

9. I have read the protective order issued by GAO in this protest, and I will comply in all respects with that protective order and will abide by its terms and conditions

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

in handling any protected material filed or produced in connection with the protest.

10. I acknowledge that any violation of the terms of the protective order may result in the imposition of sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date Executed

Typed Name and Title

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548

Matter of:

File:

Agency:

APPLICATION FOR ACCESS TO MATERIALS
UNDER PROTECTIVE ORDER
FOR CONSULTANT

1. I, _____, am a consultant employed by _____ and hereby apply for access to protected materials covered by the protective order issued in connection with this protest.
2. I have been retained by _____ and will, under the direction and control of that attorney, assist in the representation of _____ in this protest.
3. I hereby certify that I am not involved in competitive decisionmaking for or on behalf of any party to this protest or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. Neither I nor my employer provides advice or participates in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means, for example, that neither I nor my employer provides advice concerning or participates in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.
4. My professional relationship with the party for whom I am retained in this protest and its personnel is strictly as a consultant on issues relevant to the protest. Neither I, my spouse, nor any member of my immediate family holds office or a management position in any company that is a party in this protest, or in any competitor or potential competitor of a party.

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

5. I have attached the following information:

(a) a current resume describing my education and employment experience to date;

(b) a list of all clients for whom I have performed work within the 2 years prior to the date of this application, and a brief description of the work performed;

(c) a list of all clients for whom my employer has performed work within the 2 years prior to the date of this application and for whom the use of protected material could provide a competitive advantage, and a brief description of the work performed;

(d) a statement of the services I am expected to perform in connection with this protest;

(e) a description of the financial interests which I, my spouse, and/or my family has in any entity that is an interested party in this protest or whose protected material will be reviewed, if none, I have so stated;

(f) a list identifying by name of forum, case number, date, and circumstances all instances in which I have been granted admission or denied admission to a protective order, or had a protective order admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial forum; if none, I have so stated, and

(g) a statement of the professional associations to which I belong, including membership numbers

6. I have read a copy of the protective order issued in this protest and will comply in all respects with all terms and conditions of that order in handling any protected material filed or produced in connection with the protest. I will not disclose any protected material to any individual other than those individuals admitted under the protective order by GAO.

7. For a period of 2 years from the date this application is granted, I will not engage or assist in the preparation of a proposal to be submitted to any agency of the United States government for _____ where I know or have reason to know that any party to the protest, or any successor entity, will be a competitor, subcontractor, or teaming member. (Example subject of paragraph 11 (b) is the protest)

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

8. For a period of 2 years from the date this application is granted, I will not engage or assist in the preparation of a proposal for submission to _____ for _____ nor will I have any personal involvement in any such activity. *Name of contracting agency *Sample procurement or item to be protected

9. I acknowledge that any violation of the terms of the protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate disciplinary bodies or professional associations and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature _____

Date _____

Print name and title _____

3

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

ATTORNEY'S CERTIFICATION

The consultant named above has been retained by me to assist
in the representation of _____ in this
protest and will perform his/her duties in connection with
this protest under my direction and control.

Print name _____

Signature _____

Name of firm _____

Date _____

SAM-111

4

NONDISCLOSURE AGREEMENT

In order to protect and to enable the parties to discuss certain confidential information, which may be disclosed during or after the effective date of this Agreement, WICKWIRE GAVIN, P.C., (a potential subcontractor to EMERY WORLDWIDE AIRLINES, INC.), hereinafter referred to as "Recipient" and the United States Postal Service (hereinafter referred to as "Discloser" or as the "Postal Service"), an independent establishment of the executive branch of the Government of the United States, headquartered at 475 L'Enfant Plaza, S.W., Washington, DC 20260, intending to be legally bound, agree that:

1. The Recipient is WICKWIRE GAVIN, P.C. The Discloser is the Postal Service.

NOTE: This agreement is attendant to an agreement signed between EMERY, (a prequalified supplier under the Priority Mail Redesign Project), and the U.S. Postal Service, effective July 19, 1995. The agreement between EMERY and the U.S. Postal Service establishes the parameters by which EMERY may provide confidential information to its potential subcontractors under the subject project. Recipient's obligations with respect to the confidential information shall apply to confidential information communicated to it directly by the Postal Service, by EMERY, or otherwise.

2. The Recipient's duties under this Agreement shall pertain to confidential information of the Discloser which is related to the following subject(s):

The USPS Priority Mail Processing Center Phase 1 Network Draft Statement of Work, which includes thirty (30) attachments, some of which are contained on diskettes, with portions of said SOW, attachments, and diskettes marked as Proprietary Information. The attached page, Attachment 1, to this document, contains the listing of those attachments by number and title, marked as Proprietary Information, as well as the indication by asterisk (*) of the attachments to be provided on diskette, by number and title, marked as Proprietary Information, and the listing of the pages in the Statement of Work, marked as Proprietary Information, which contain U.S. Postal Service "Proprietary Information;" any other written information marked as Proprietary Information which is related to said USPS Draft SOW, attachments, and diskettes; (notwithstanding that paragraph 2 above identifies the U.S. Postal Service as the Discloser, said documents, in fact, will be provided to the recipient by EMERY) and any oral communications related to said USPS Draft SOW, attachments, and diskettes which are designated as Proprietary Information at the time of disclosure and summarized and identified as Proprietary Information in writing to Recipient within fifteen (15) days of disclosure.

The USPS internally prepared design package, which includes general network design documentation as well as design documentation for each of the ten (10) designated Priority Mail Processing Center (PMPC) sites; any other written information related to said USPS design package; and any oral communications related to said USPS design package.

Such confidential information is hereinafter referred to as "Information" or "the Information."

3. Recipient's duties under this Agreement shall apply to Information which is disclosed by employees, agents, consultants, affiliated persons, affiliated companies, or any other representatives of Recipient.

4. Recipient shall protect the Information by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the Information, as the Recipient uses to protect its own confidential information, and, in addition, shall comply with all specific terms of this Agreement regarding Recipient's handling and use of the Information.

EXHIBIT

D

ALL-STATE INTERNATIONAL

5. Recipient shall make use of the Information only for its consideration, preparation, and discussion with the Postal Service of Recipient's proposal(s) to perform work under requests for proposals issued by the Postal Service for Priority Mail Processing Centers contracts, and, if Recipient is awarded a contract or subcontract under any such request for proposals, for performing the contract or subcontract work. Recipient shall disclose the Information only to those of its employees who are actively engaged in such activities. Recipient agrees that it shall instruct each of its employees who is given access to any of the Information of the existence and terms of the Agreement and that it shall obtain each such employee's prior written agreement to abide by all the terms of this Agreement. The Postal Service authorizes Recipient to disclose the Information to a subcontractor, prospective subcontractor, or other party only if such subcontractor, prospective subcontractor, or other party has entered into a nondisclosure agreement with the Postal Service with respect to such Information and Recipient has received the express written consent of the Postal Service prior to Recipient's disclosure of the Information. The Postal Service will not enter into a nondisclosure agreement with such subcontractor, prospective subcontractor, or other party unless the Postal Service, in its sole discretion, determines that such subcontractor, prospective subcontractor, or other party has a legitimate reason, related to a Postal Service Request for Proposal (RFP) or contract, to know the Information.

6. Recipient shall indemnify Discloser against all loss or damages resulting from any unauthorized disclosure of Information by Recipient or any employee of Recipient, or any other party to whom Recipient or its employees has disclosed such Information. Recipient agrees that in the event of such unauthorized disclosures, Discloser shall have the right, in addition to any other remedies which may be available to it, to injunctive relief enjoining any such acts or attempts to breach this Agreement, it is being acknowledged by the parties that monetary remedies are inadequate. Recipient shall not be liable to indemnify Discloser for any losses or damages hereunder caused by the negligent act or omission of Discloser, their employees, invitees, officers, directors or agents, and in no event shall Recipient be liable for any special, incidental or consequential damages.

7. In the event that Recipient is required by judicial or administrative process to disclose Information, Recipient shall promptly notify Discloser and allow Discloser a reasonable time to oppose such process.

8. Recipient's duties respecting Discloser's Information shall apply to Postal Information disclosed in writing, orally, in the form of tangible property, electronically or otherwise to Recipient, by any means, format, or medium.

9. Recipient's duties under this Agreement shall not apply to information which (a) was in Recipient's possession before receipt from Discloser; (b) is or becomes available to the public through no fault of Recipient; (c) is received in good faith by Recipient from a third party (other than EMERY) and is not subject to an obligation of confidentiality owed to the third party; or (d) is independently developed by Recipient without reference to information received hereunder.

10. Recipient agrees to return all extant Information (including tangible products or materials received from the Discloser, including all copies thereof, upon the request of the Discloser or upon Recipient's determination that it no longer has a need for the Information, except that Recipient may retain in the office of its legal counsel one copy of written Information for record purposes only.

11. Discloser makes no representation, warranty, assurance, guaranty, or inducement with respect to the infringement of trademarks, patents, copyrights, right of privacy, or any other rights of third parties in the Information or any other data disclosed to Recipient. Discloser does not warrant the accuracy or usefulness of any of the Information or any other data disclosed to

Recipient. Discloser reserves the right to discuss with any other parties the information or any other data disclosed to Recipient.

12. Neither party acquires any license or other rights in the intellectual property of the other party pursuant to this Agreement.

13. Neither party has any obligation under this Agreement to purchase or to offer for sale any products or services of the other party or any products or services incorporating information.

14. The parties do not intend that any agency or partnership be created between them by this Agreement.

15. This Agreement constitutes the entire understanding between the parties hereto regarding the information and supersedes all previous communications, representations, and understandings, oral or written, between the parties with respect to the subject matter of this Agreement. All additions or modifications to this Agreement must be made in writing and must be executed by both parties.

16. Any disputes concerning this Agreement shall be decided under the federal laws of the United States.

WICKWIRE GAVIN, P.C.

UNITED STATES POSTAL SERVICE

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____